

310
CITIZEN ACCESS TO BROADCASTING
IN THE 1960s AND 1970s

by

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TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	<u>Brief History</u>	2
B.	<u>The Role of the Citizen Groups</u>	4
II.	REVIEW OF THE LITERATURE	7
A.	<u>Works by Prominent First Amendment Scholars</u>	8
1.	Jerome Barron	8
2.	Benno Schmidt	10
B.	<u>Historical Studies</u>	13
C.	<u>Policy and Law Studies</u>	14
D.	<u>Primers</u>	15
E.	<u>Monographs</u>	16
III.	A PRECEDENT FOR CITIZEN INTERVENTION	20
A.	<u>Early Citizen Councils</u>	20
1.	The Women's National Radio Committee	20
2.	NAB-Supported Listener Activities	21
B.	<u>Activism in the Early 1960s</u>	22
C.	<u>The United Church of Christ</u>	24
D.	<u>The Appeal</u>	28
E.	<u>The Second Appeal</u>	32
IV.	CITIZEN INTERVENTION IN LICENSING	38
A.	<u>The KTAL Settlement</u>	39
B.	<u>The Captial Cities Settlements</u>	42
C.	<u>FCC Disapproval of Settlements</u>	45
1.	The WAVO Agreement	45
2.	The WROR Agreement	46

D.	<u>The Proposed Agreements Rulemaking</u>	47
E.	<u>Savings Clauses</u>	50
1.	The WAUD Savings Clause	51
2.	The KMJ Savings Clause	52
3.	The KTTV Savings Clause	53
F.	<u>The Agreements Report and Order</u>	54
G.	<u>Impact of the Settlements</u>	55
V.	THE ACCESS "DOCTRINE"	60
A.	<u>The Fairness Doctrine</u>	60
B.	<u>Red Lion</u>	62
C.	<u>Banzhaf</u>	64
D.	<u>Other Commercials Addressing Controversial Issues</u>	67
1.	Friends of the Earth	69
2.	David C. Green	71
E.	<u>Fairness Doctrine Ruling</u>	71
F.	<u>Access to Program Time</u>	72
G.	<u>Paid Access to Program Time</u>	73
1.	FCC Ruling	74
2.	Commissioner Johnson's Dissent	74
H.	<u>CBS v. Democratic National Committee</u>	75
1.	The Court of Appeals Decision	75
2.	The Supreme Court Decision	77
3.	The Dissent	78
I.	<u>The Access "Doctrine?"</u>	80
VI.	SUMMARY	85

VII.	AFTERWORD	89
A.	<u>The Citizen Groups Today</u>	89
B.	<u>Looking to the Future</u>	92
VIII.	SELECTED BIBLIOGRAPHY	96

I. INTRODUCTION

The complex relationship between the broadcaster and his audience is often discussed but seldom documented. Broadcasting is unique among the mass media in that the broadcaster is required to listen to his audience and to serve the public interest. Listeners and viewers, in turn, have always wanted to influence programming decisions, often to the point of demanding air time.

The dynamics of this unique relationship is the topic of this study. One way to look at the conflict is broadcaster control versus public participation. Another is the broadcaster's First Amendment right of free press versus the public's implicit First Amendment right to hear a broad range of ideas. At issue is the broadcaster's right to monopolize a public resource for a profit. Since the beginning of broadcasting, citizens not fortunate enough to have a license have sought compensation from broadcasters in the form of public service obligations.

Through the years countless remedies have been attempted, including citizen advisory councils, fairness obligations, ascertainment requirements, petitions to deny and equal employment opportunity sanctions. Today, instead of greater understanding between broadcaster and listener, there is greater confusion, and even hostility. The problem is in finding an equitable mechanism to provide citizen access to a limited access medium.

Brief History

This study will examine access to broadcasting in the 1960s and early 1970s, critical years in the forging and evolution of access mechanisms. The period begins in 1966 with the watershed decision United Church of Christ v. FCC (hereafter, Church of Christ) which for the first time gave citizens in the broadcaster's community legal standing in license renewal challenges.

Church of Christ, in the words of one scholar, is "a Magna Carta (but not a carte blanche) for active public participation in broadcast regulation."¹ According to Jerome Barron, a prominent First Amendment scholar, "Church of Christ marks the beginning of a judicial awareness that our legal system must protect not only the broadcaster's right to speak but also, in some measure, public rights in the communications process."²

Church of Christ was the opening salvo in a decade-long battle that pitted an increasing number of disenfranchised citizens and activists against broadcasters, legislators and the rest of status-quo America. It is not surprising that the decade that saw the rise of civil rights protests, feminism, consumerism, anti-war protests and Black Power also saw a rise in demands for a forum on radio and television.

The battle for access following Church of Christ continued on many fronts. One area of contention was

licensing, where petitions to deny became a dominant tool of citizen groups. In some cases a citizen group would threaten a petition to deny, then withdraw it upon certain programming and management concessions from the licensee. The Federal Communications Commission (FCC) encouraged such citizen-licensee agreements until citizen demands began to usurp licensee responsibility.

Another volatile area was the Fairness Doctrine, which was stretched in many directions, including application to advertising. Paid access was an issue pressed by those dissatisfied with the workings (or failures) of the Fairness Doctrine.

Finally, the position was held by many broadcasters, legislators and legal scholars that the broadcaster has the same First Amendment rights as the newspaper publisher. Each request for air time and each petition to deny brought more broadcasters into this camp, and the power of this lobby ultimately had a large impact on the pro-access forces.

While the battle for access is far from over even today, the 1973 Supreme Court decision Columbia Broadcasting System v. Democratic National Committee (hereafter CBS v. DNC) did much to quell the activism of the sixties. The question in CBS v. DNC was whether or not broadcasters must recognize a right of paid access. The answer was a resounding No. Warren Burger, architect of the Church of Christ decisions which had offered so much promise to citizen groups just a few years

before, was now Chief Justice. In this case, he took a different view:

It would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government.³

Essentially, the Court rejected the view of the broadcaster-as-proxy of the public interest in favor of broadcaster-as-trustee. Fairness obligations were affirmed, but the Court held access requirements to be in conflict with the broadcaster's First Amendment rights. Thus, a period which began with citizens demanding free air time closed with them being refused an opportunity to purchase time.

The Role of the Citizen Groups

According to Erwin Krasnow, Lawrence Longley and Herbert Terry, authors of The Politics of Broadcast Regulation, "politics consists of those activities leading to decisions about the allocation of desired goods."⁴ They contend that there are six determiners of regulatory policy: the FCC, the broadcast industry, citizen groups, the courts, the White House (which includes not only the president but also his

bureaucracy) and Congress.⁵ Each component has its own kind of power and its own special interests.

This study will follow one of these determiners of regulatory power, the citizen groups, through its admission as a member of the decision-making process (via Church of Christ) to the end of its first formative period. While citizen groups and their activities will be the prime element of this study, critical, too, is the relationship between the citizen groups and the other determiners of regulatory policy on a given issue.

The citizen groups were the weakest, the poorest and the most disorganized participants in the regulatory process in the 1960s and 1970s. Yet through the formation of some unlikely alliances, citizen groups won several important victories. Following is an account of those alliances, the battles and the victories--a critical yet largely unexplored aspect of the history of broadcast regulation.

Chapter 1 Notes

¹Frank Kahn, Documents of American Broadcasting, 2nd ed., (New York: Appleton-Century-Crofts, 1973), p. 639.

²Jerome A. Barron, "Access To The Press--A New First Amendment Right," Harvard Law Review 80 (1967): 1665.

³Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 120-21 (1973), cited by Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access, (New York: Praeger Publishers, 1976), pp. 177-178.

⁴Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, The Politics of Broadcast Regulation, 3d ed., with a Foreward by Newton Minow, (New York: St. Martin's Press, 1982), p. 2.

⁵Ibid., p. 33.

II. REVIEW OF THE LITERATURE

Because access to broadcasting is a volatile issue, much of the literature is advocacy-oriented. Most available material bears the imprint of a certain point of view and must be used with this in mind.

Primary documents such as court decisions, FCC reports and Congressional testimony are the best sources and are used whenever possible. One limitation in using them, however, is that they tend to announce or settle official disposition of an issue. Thus, the actual maneuverings by affected parties usually must be documented with other sources.

Essential in studying the FCC's actions are the Federal Communications Commission Reports. These list the full text of all FCC decisions, including dissents. United States Court of Appeals decisions are available in the Federal Reporter, while U.S. Supreme Court decisions are officially published in United States Reports. Laws relating to broadcasting are found in the United States Code.

A good secondary source of information on governmental activities concerning broadcasting is Pike and Fischer's Radio Regulation. Another compilation of legal cases concerning broadcasting is the Media Law Reporter.

The body of secondary sources is not vast, but it is diverse. Several books and law journals have addressed the issue from a legal scholarship point of view. Articles

examining a particular aspect of access are found in mass communication scholarly journals, such as Journal of Broadcasting. The industry point of view is well presented in Broadcasting magazine. Several publications by activist groups such as United Church of Christ's Office of Communication present a public interest point of view. Finally, newspapers and magazines occasionally offer relevant articles.

Since so much of the literature is partisan, the following survey is arranged according to different views of access. This will present the breadth of writing on the issue. Following this is a description of other important sources which take either a more objective or a limited point of view.

Works by Prominent First Amendment Scholars

While Jerome Barron and Benno Schmidt are not the only First Amendment scholars who have addressed the access issue, they have developed the most credible and complete arguments. Further, since they take opposing sides, it is useful to contrast their ideas in the search for political truth.

Jerome Barron

According to Barron, a renowned First Amendment scholar

and lawyer, modern constitutional theory, "is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible."¹ For Barron, protecting expression is not enough. We must also create new mechanisms which will allow affirmative access to our daily newspapers and broadcast stations--in effect, making them an outlet for all.

In Barron's view, the primary threat of content control comes not from government censorship but from the few centralized owners and controllers of the mass media. Our Constitution's inability to deal with non-governmental obstructions to the spread of truth, "becomes critical when comparatively few private hands are in a position to determine not only the content of information but its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper."²

Barron points to the development of new media--such as the sit-in, the hunger strike and the riot--which are a response by those unable to gain admission to the "marketplace of ideas" through conventional means. Of the 30 to 35 reporters who dutifully relayed the protest of a young Quaker who burned his draft card, Barron writes:

Lack of access can lead to crime but surely a wiser solution to that problem is to make provision for access rather than to use lack of access as a defense. Resort to crime in such cases reveals the need for legitimate and structured access to the media. When crime gains an entry that conventional

dissent is not granted, the consequences are disheartening and illuminating. The jaded standards of the media stand revealed.³

Barron first articulated his views in "Access to the Press--A New First Amendment Right," published in 1967 in the Harvard Law Review. He followed this in 1973 with a book, Freedom of the Press for Whom?, which deals with access to both print and broadcast media. It is interesting that the most eloquent book on access was written at the zenith of the access movement. At that time, the Florida Supreme Court had just approved a right of access to newspapers in Tornillo v. Miami Herald, and the U.S. Court of Appeals in Washington, D.C., had just created a right of paid access in CBS v. DNC. Both decisions were reversed on appeal to the U.S. Supreme Court.⁴

Benno Schmidt

The other leading legal scholar who has addressed the access issue is Benno Schmidt. He is highly critical of access requirements, but stops just short of giving broadcasters First Amendment parity with their cousins in print. Citing the success of citizen groups in several cases, Schmidt writes, "Application of the (Fairness) doctrine in renewal proceedings has been far more effective than specific access rights in opening broadcasting to the views and participation of minority groups."⁵

Schmidt's principal criticism of access rights is that they have a "chilling effect" on the broadcaster's rights of free expression. He addresses access rights in the so-called "equal opportunities" clause of the Communications Act of 1934 (Sec. 315[a]), access rights derived from the Fairness Doctrine (such as the personal attack rules), and access rights created by general rulemaking.

He contends that under the requirements of equal opportunities for political candidates in Section 315(a), broadcasters are reluctant to give time in elections where fringe candidates would also qualify for free time. He notes the creation of exemptions (such as for Presidential debates), the difficulty of administering them from the broadcaster's point of view, and the unlikely prospects for reform:

...public interest in robust debate is a sorry loser to the political anxieties of presidents and their parties, who are understandably reluctant to encourage access for their serious competitors. Many types of access requirements would be so embroiled with the political fortunes of the lawmakers responsible for promulgating these requirements that the public interest and First Amendment values would likely receive short shrift.⁶

Schmidt criticizes access rights derived from the Fairness Doctrine as unwieldy. He cites the FCC-directed right-of-reply to speeches by President Nixon (which generated rights-of-reply to the replies), and the counter-commercial

ruling on cigarette advertising (which the FCC desperately tried to limit to cigarette advertising alone), as examples where general application of the Fairness Doctrine provided the better (and eventual) solution.

Finally, Schmidt criticizes access rights created by general rulemaking. The personal attack rules "have had to be severely qualified to prevent them from overwhelming the public with trivia or becoming unmanageable for the broadcaster."⁷ He further writes that the FCC's handling of personal attack complaints has "a tendency to vagueness and inconsistency."⁸

While Schmidt is critical of access requirements, he recognizes that the broadcaster is granted "use of a valuable, scarce resource at no cost,"⁹ and, that "to give away valuable spectrum rights, with no strings attached, would pose stubborn problems of justification."¹⁰ The "string" he finds most appropriate is general application of the Fairness Doctrine at license renewal time. He notes with approval that since CBS v. DNC, the trend of the Supreme Court, the U.S. Court of Appeals for the District of Columbia and the FCC is in this direction. The trend culminates in the 1974 FCC Fairness Doctrine report which concludes, "we regard strict adherence to the Fairness Doctrine. . . as the single most important requirement of operation in the public interest--the 'sine qua non' for the grant of a renewal of license."¹¹

Surprisingly, Schmidt also favors citizen intervention in

the licensing process:

The threat of expensive and lengthy hearings on renewal challenges, and the possibility of nonrenewal if an overall pattern of fairness violations or employment discrimination can be established, are substantial inducements for broadcasters to seek constructive settlements with minority and other citizen groups.¹²

Historical Studies

Fred W. Friendly's The Good Guys, the Bad Guys and the First Amendment examines the Fairness Doctrine in the 1960s and 1970s, a period when fairness and access issues frequently crossed and became blurred. This book provides a wealth of information due to Friendly's attention to detail and his compelling presentation of the issues surrounding the Fairness Doctrine in an historical context. While he editorializes at the end that broadcasters should improve their public service performance as a first step toward eventually becoming freer of regulations, the rest of the book is objective and well-documented.

Citizens' Groups and Broadcasting by Donald Guimary traces the evolution of citizen groups, from the PTA and church-dominated groups of the 1920s and 1930s through the activist groups of the 1960s and 1970s. He takes a close look at two important recent groups: the Citizens' Communication Center, one of the first public interest law firms to

intervene in broadcasting matters, and Action for Children's Television, a successful single-issue group which may be a model for citizen groups in the 1980s. Since groups like these were central to the evolution of broadcasting policy in the 1960s and 1970s, Guimary's study provides valuable information about a little-documented subject.

Policy and Law Studies

The Politics of Broadcast Regulation, by Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, is an excellent survey of the processes that influence broadcast policy. The authors explore six determiners of regulatory policy (mentioned in the introduction) which interact to create a regulation environment. Five case studies illustrate the environment in action. While only one case study has a direct bearing on this study (comparative license renewals), the book gives a good explanation of the functioning of the FCC.

Barry Cole and Mal Oettinger's Reluctant Regulators follows a similar approach, but focuses on the FCC during the 1970s. Several chapters dealing with the FCC-citizen group interface and a study of children's TV (and the activist group Action for Children's Television) make this book valuable.

Frank J. Kahn's Documents of American Broadcasting is a useful collection of broadcast-related legal cases and policy

statements. While Kahn's introductions are brief, the cases are well-chosen and each section offers a useful bibliography. Of special interest is the chapter "The Public's Interest," which includes the text of the two Church of Christ decisions.

Primers

Several books which have appeared since the mid-1960s go beyond advocacy to the point of instructing how to intervene in programming and licensing matters. Of these, the most famous is Nicholas Johnson's How to Talk Back to Your Television Set. The book is a collection of essays on such topics as the influence of television, media ownership, civil rights and the media, and cable TV. It includes a section entitled "What You Can Do to Improve TV," and offers information on public interest law firms, where to write for relevant materials and how to use a broadcaster's files. It also includes license expiration dates for radio and television stations so citizens can properly plan their intervention. This work came from the first FCC commissioner to openly advocate the causes of the most radical citizen groups. How to Talk Back to Your Television Set enjoyed several printings in hardcover, plus paperback distribution. As evidence of his support for citizen groups, Johnson donated all royalties from the book to "organizations devoted to improving the contribution of television to the quality of

American life."

How to Protect Your Rights in Television and Radio, by Ralph M. Jennings and Pamela Richard and published by the United Church of Christ's Office of Communication, is a basic manual on broadcast regulation from the citizen's point of view. After a general orientation to the theory of regulation, it offers detailed and specific information of FCC rules and procedures. Actual FCC forms are even reproduced. While other books may better explain the hows and whys of broadcasting, this book tells the interested citizen exactly what to do in actual situations.

Less practical and more polemical than How to Protect Your Rights in Television and Radio is Andrew O. Shapiro's Media Access. It provides a mixture of actual and hypothetical cases to explain laws and policies in areas such as fairness, equal time, personal attacks, editorializing and complaints.

Monographs

Willard D. Rowland, Jr.'s The Illusion of Fulfillment: The Broadcast Reform Movement, published in Journalism Monographs #79, documents the mixed record of the reform groups in the 1960s and 1970s. He locates the broadcast reform movement in the context of American history, then examines the advances of the reform movement. Especially

useful is the breakdown of citizen activity in such areas as licensing and cable. Rowland concludes that the citizen group activity has had minimal effect upon the institution of broadcasting in spite of several major successes. His discussion of the key issues and cases is one of the most complete available. It also offers an excellent bibliography.

Henry Geller's The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action, underwritten by the Ford Foundation and published by Rand, is a well-documented and authoritative look at fairness and access issues. Former general counsel to the FCC, Geller is privileged to a unique view of the policy-making mechanism. The book is especially valuable for its bibliography of legal articles relating to access and fairness.

Also published by Rand, Joseph A. Grundfest's Citizen Participation in Broadcast Licensing Before the FCC explains the avenues for citizen involvement, describes the history of citizen-licensee agreements and offers recommendations for improving relationships between citizen groups and broadcasters.

Various works have addressed aspects of broadcast policy and citizen participation in broadcasting, but none have combined a history of the citizen's movement with an explanation of the laws and policies that made its existence possible. At any given time broadcasters and citizens operated under different legal rules and political conditions.

The purpose of this study is to examine this changing relationship through the turbulent years following Church of Christ through CBS v. DNC.

Chapter 2 Notes

¹Jerome A. Barron, "Access To The Press--A New First Amendment Right," Harvard Law Review 80 (1967): 1665.

²Ibid., p. 1643.

³Jerome A. Barron, Freedom of the Press for Whom?: The Right of Access to Mass Media, (Bloomington: Indiana University Press, 1973), p. 121.

⁴287 So. 2d 78 (Fla. 1983).

⁵Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access, (New York: Praeger Publishers, 1976), p. 190.

⁶Ibid., p. 184.

⁷Ibid.

⁸Ibid., p. 185.

⁹Benno C. Schmidt, Jr., "Access to the Broadcast Media: The Legislative Precedents," Journal of Communication 22 (Spring 1978): 62.

¹⁰Ibid., p. 63.

¹¹Schmidt, Freedom of the Press vs. Public Access, p. 190.

¹²Ibid.

III. A PRECEDENT FOR CITIZEN INTERVENTION

Prior to the 1966 Church of Christ decision, citizen group intervention was limited and sporadic. One kind of group was the church- or PTA-based listener council, which engaged in polite dialogue with the broadcaster and commended "wholesome" programs. Another kind of group, more rare than the first, was formed by citizens to oppose sale of a property to prevent concentration of ownership in local media.¹ But while these groups were at times numerous and vocal, they were powerless.

Church of Christ changed all this by giving interested parties direct access to the licensing process. This spawned a new kind of citizen group, the single-issue activists. Suddenly the polite dialogue between broadcaster and listener council gave way to a shouting match as activists of all kinds lined up to air their grievances. But this time, lacking satisfactory resolution, the activists could take their case to the FCC and the courts.

Early Citizen Councils

The Women's National Radio Committee

One of the first powerful listener groups was the Women's National Radio Committee (WNRC), founded in 1934 by Yolanda

Moroirion. According to Ralph Smith, author of a dissertation on early radio criticism, the committee was "an amalgam of a score of women's clubs which singled out specific programs for brief statements in its monthly bulletin, Radio Review, of either commendation or castigation."² Business Week reported that the WNRC "has aggressively promoted its crusade for radio reforms, has rallied to its standard 10 million women, members of various organized women's groups."³ Among the 27 cooperating groups were the American Association of University Women, the Association of the Junior League of America, the General Federation of Women's Clubs, the Daughters of the American Revolution and the Women's Christian Temperance Union.

The prime concern of the committee was children's programming. Members monitored broadcasts, developed criteria for evaluating programs and promoted "worthwhile" shows, usually by working with the public schools.

NAB-Supported Listener Activities

The National Association of Broadcasters (NAB) supported citizen group activity in the 1940s by hiring Dorothy Lewis as coordinator of listener activities. In that position she aided in the formation of radio councils in 25 to 30 cities. According to Lewis, "the councils' purposes are to interpret the problems of radio broadcasting to the listeners and to

bring to the radio industry the wishes of the public."⁴ At its peak, "some 2,500,000 persons are affiliated in this manner with radio, actively supporting and promoting the industry. Thus, listeners and broadcasters are working together 'to the public interest, convenience and necessity.'"⁵

The council movement began to decline in the mid-1940s. Citizen attention was diverted by World War II. The NAB reversed its stand on citizen councils in 1948 and terminated Lewis' position for fear she was creating a "Frankenstein."⁶

A major factor contributing to the decline of radio councils in the 1950s was the phenomenal rise of television. Also, according to Donald Guimary, the industry had become financially sound and no longer felt an obligation to seek advice from the councils.⁷

Activism in the Early 1960s

An early advocate of consumer rights in broadcasting was the nonprofit watchdog organization Consumer's Union (CU). In a 1960 report, "The Government Regulatory Agencies," published in Consumer's Union Report, the FCC was called "a demoralizing spectacle."⁸ The report concluded:

. . . that only through the implementation of the consumer position in government can an avenue be opened up for the effective expression of the public interest in such regulatory programs as that administered by the FCC.

Following the quiz show scandals, CU testified in FCC hearings in December 1960, suggesting creation of a Television and Radio Consumers Council which would advise the FCC. The council would (1) review all FCC licensing decisions, (2) request additional data on a licensee's performance, and (3) publicize its findings.¹⁰

Consumer's Union also proposed reissuance of the 1946 "Blue Book" and, in what reads like a wish list for citizen activists, called for:

(1) mandatory hearings in all license renewals to be held in the locale of the broadcasting station; (2) publicity of the renewal hearings involved for a given number of days at fixed hours, inviting public participation in the proceedings; (3) requiring broadcasters to maintain for public investigation the commitments he made regarding programming and advertising; (4) requiring each broadcaster to air at least once a week during prime time a statement of the basis upon which he holds the exclusive privilege to the public domain and invite set-owner comment of the station's programming and advertising and establish in each of the FCC's 24 district offices a consumer review staff to read and classify public responses and to forward such material to the Consumer Advisory Council of the FCC; (5) requiring the declarations of advertising policy to be posted for public inspection in each licensee's place of business; (6) prohibiting the sale of any license without a full scale rehearing on the transfer of the privilege; and (7) setting up a graduated system of licensing fees based on station signal-strength and on advertising revenues.¹¹

While nothing came of these demands, they are of interest as a precursor of the issues debated by citizen groups later in the decade. In fact, most of these demands were taken up later by citizen groups, public-interest law firms, the FCC and the courts.

While the licensing process was typically a matter between broadcasters and the FCC in the early 1960s, outside groups intervened in several licenses reversal cases. The state of New Jersey opposed sale of WNTA-TV (now WNET) by National Telefilm Associates to Educational Television for the Metropolitan Area because the transfer deprived New Jersey of its only commercial VHF allocation. The state lost, but won a concession of one hour each day devoted to news of interest to New Jersey viewers.

In 1963 a citizen group in Sacramento opposed sale of KOVR-TV, owned by Metromedia, Inc., to the McClatchy newspaper chain, on grounds of concentration of ownership. The group approached their congressman rather than the FCC, which approved the transfer. Other citizen groups opposed sale of broadcast stations in Little Rock, Arkansas (KARK-AM-FM-TV), and in Rockford, Illinois (WROK-AM-FM-TV), with no success.

Thus, by 1965, there was little precedent for success for the citizen groups. The listener councils had largely disappeared some 20 years before, and the few attempts to intervene in policy or licensing matters before the FCC were ignored.

The United Church of Christ

Television station WLBT in Jackson, Mississippi, consistently violated the Fairness Doctrine by airing only a

pro-segregationist viewpoint in its news and public affairs programs, and it occasionally censored network shows dealing with the issue.¹²

For example, Thurgood Marshall, director of the legal defense fund for the National Association for the Advancement of Colored People (NAACP) and later the first black Supreme Court Justice, appeared on NBC's "World at Home" show on September 7, 1955. As he discussed the landmark 1954 Supreme Court decision Brown v. Board of Education, which held that the "separate but equal" standard for blacks was unconstitutional, WLBT interrupted the show with a slide reading, "Sorry, Cable Trouble from New York."

In 1957, WLBT broadcast a special on "The Little Rock Crisis" with three white segregationists who were also Mississippi officials: Senator James O. Eastland, Representative John Bell Williams and Governor James P. Coleman. When Medgar Evers, NAACP field secretary for the state of Mississippi, asked for an opportunity to respond, he was refused. The station claimed the show was simply a report to the citizens of the state from their elected officials.

In 1962, WLBT editorialized against admission of James Meredith and integration at the University of Mississippi. In September 1962, WLBT ran spot announcements from the Jackson (white) Citizens Council, which claimed Communists were behind the movement for integration. Station Manager Fred Beard was a member of the council. In addition, the white supremacy

"Freedom Bookstore" was run by the station.

In May 1963, tension was rising over the integration issue. On one broadcast, Jackson Mayor Allen Thompson attacked the NAACP and Medgar Evers. In accordance with the Fairness Doctrine, Evers was invited to respond, and a tape of his response was aired May 20. According to Fred Friendly, the response time was offered because Senator Eastland had tipped the station management that the Justice Department was monitoring WLBT.¹³

Evers was assassinated June 12, and the segregation/integration debate rose to a fever pitch. Dr. Everett Parker, director of the Office of Communication for the United Church of Christ, was moved by Evers' assassination and was determined to force access to broadcasting for blacks.¹⁴ In examining WLBT's failure to serve the needs of blacks, almost 50 percent of Jackson's population, he found a test case.

Parker came to Jackson, and using a crew of student volunteers from Millsaps College there, monitored WLBT for the week March 1-7, 1964. He found evidence of discrimination and filed a petition to deny WLBT's license when it came up for renewal.

Parker felt his petition would be stronger if local residents supported it, so he enlisted the help of two opinion leaders of the Mississippi black community: Dr. Aaron Henry, leader of the Mississippi NAACP, and Robert L.T. Smith, an organizer for the Mississippi Freedom Democratic Party and a

former candidate for Congress. To give more local weight to the petition, the United Church of Christ at Tougaloo was also named. The petitioners also claimed to have intervened on behalf of all television viewers in the state.

The petition claimed WLBT failed to present a proportionate number of blacks on the air, that it was unfair in presenting controversial issues, especially those concerning blacks, that it discriminated against the Catholic Church, and that it ran excessive commercials.

Smith and Henry claimed standing as individuals and as representatives of organizations which were denied a reasonable opportunity to respond to criticism, a violation of the Fairness Doctrine.

The FCC denied standing, but did acknowledge problems with WLBT's performance. Without holding a hearing to resolve the complaints, the FCC renewed the license for a one-year probationary period, on the condition that "the licensee comply strictly with the established requirements of the Fairness Doctrine."¹⁵ The Commission also directed WLBT to "immediately cease discriminatory programming patterns."¹⁶

FCC Chairman William Henry and Kenneth Cox were the only commissioners to oppose renewal without a hearing, primarily on the grounds of misrepresentation by the licensee. According to Henry:

These petitions contain most serious allegations which, if true, would indicate that the station has made

misrepresentations to the Commission, deceived the public, violated Commission policy, broken Federal and State laws, and ignored the needs of a substantial portion of the community it has pledged to serve. The Commission, in my opinion, should resolve these important issues in an evidentiary hearing. The licensee is entitled to such a hearing as a matter of right on the question of license renewal; to deny the same right to complaining members of the public is, in this instance, a clear abuse of discretion.¹⁷

Henry's contention that the complaining members of the public should have legal standing would become the main issue in the ensuing court battle.

The Appeal

Parker appealed the decision, and the case was heard by the U.S. Court of Appeals for the District of Columbia on December 23, 1965. Judges Burger, McGowan and Tamm heard the case, with Burger handing down the opinion on March 25, 1966, reversing the decision of the Commission.

Burger addressed two questions in the opinion:

The questions presented are (a) whether Appellants, or any of them, have standing before the Federal Communications Commission as parties in interest under Section 309 (d) of the Federal Communications Act to contest the renewal of a broadcast license; and (b) whether the Commission was required by Section 309 (e) to conduct an evidentiary hearing on the claims of the Appellants prior to acting on renewal of the license.¹⁸

Burger pointed out that historically the concept of

standing is not static, then discussed the two major precedents. In NBC v. FCC (KOA) the Supreme Court allowed intervention to those claiming electrical interference. In FCC v. Sanders Brothers Radio Station the Court granted standing to those alleging economic injury. According to Burger, ". . .the courts have resolved questions of standing as they arose and have at no time manifested an intent to make economic interest and electrical interference the exclusive grounds for standing."¹⁹

Burger also gave the reasons for standing, recalling the Sanders case which stated, ". . .but these private litigants have standing only as representatives of the public interest."²⁰ He also said:

Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.²¹

In emphasizing that standing is to be granted only to "vindicate the broad public interest," Burger touched on what would become a possible abuse--manipulation of standing rights for personal gain. He listed several groups, such as civic associations, professional societies, unions, churches and educational institutions, which might be considered

responsible and representative. He noted that:

These groups. . . usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests."²²

The appellants were not specifically granted standing in the opinion. Instead, the Court held that "the Commission must allow standing to one or more of them as responsible representatives to assert and prove the claims they have urged in their petition."²³

The Court further held that an evidentiary hearing was necessary to determine if renewal of WLBT's license was in the public interest. This was based on Section 309 (e) of the Communications Act, which stipulates hearings in renewal cases where "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding 'that the public interest, convenience and necessity will be served by the license renewal.'"²⁴

According to Burger, the station's past performance is the best indicator:

. . . in a renewal proceeding past performance is its best criterion. When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant, as we noted in our discussion of standing, must literally "run on his record."²⁵

In Burger's opinion, a hearing was required because WLBT's record was clearly bad. The Commission had acknowledged misconduct by the station as early as 1959, and there were numerous complaints in the FCC's files from the likes of Smith and Henry.

The Court found the Commission's renewal erroneous because it was given on the condition that WLBT improve its practices. According to Burger, "the conditions which the Commission made explicit in the one-year license are implicit in every grant."²⁶ Yet WLBT claimed it had lived up to its public service obligations. This particularly galled Burger:

We recognize that the Commission was confronted with a difficult problem and difficult choices, but it would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity and willingness to change, for WLBT had stoutly denied Appellants' charges of programming misconduct and violations. In these circumstances a pious hope on the Commission's part for better things²⁷ from WLBT is not a substitute for evidence and findings.

The Court concluded by directing the Commission to hold hearings on WLBT's license renewal, allowing public intervention, although it did not order that Parker, Church of Christ, Henry or Aaron specifically be granted standing. The Court suggested that the FCC consider that standing be granted since all were determined to be responsible representatives of

the Jackson listening and viewing public, but it left the ultimate decision to the Commission. The decision also refrained from further condemnation of WLBT, since the station may "be able to benefit from a showing of good performance."²⁸

The Second Appeal

It took the FCC two years to conduct hearings on WLBT's license renewal, and in that time the station improved its performance. It was granted a full three-year renewal on June 27, 1968.²⁹ The five-person majority said that the intervenors had failed to prove their charges and that WLBT's improved performance had been a positive factor. Commissioners Kenneth Cox and Nicholas Johnson filed a 32-page dissent arguing that renewal of the license was disobeying the court of appeals.

The Court reversed the Commission's renewal of WLBT's licensee on June 20, 1969, in a harshly-worded opinion. Warren Burger again wrote for the panel in his last opinion before becoming Chief Justice of the U.S. Supreme Court.

In this opinion (hereafter Church of Christ II) Burger found fault with how the Commission allocated the burden of proof:

We did not intend that intervenors representing a public interest be treated as interlopers. Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context,

more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.³⁰

Burger explained that the "Examiner's erroneous concept of the burden of proof shows a failure to grasp the distinction between 'allegations' and testimonial evidence, and prevented the development of a satisfactory record."³¹ Several contentions were "completely discounted" by the FCC, such as the results of Parker's seven-day monitoring study of WLBT, the censoring of network programs dealing with racial tension in Jackson, and the use of "nigger" and "negra" by WLBT newsmen. Only Johnson and Cox, the two dissenting commissioners, recognized this:

We remain perplexed by our colleagues' interpretation of the burden of proof issue, notwithstanding their attempt to further elucidate this problem in the further statement. As we noted in our dissenting opinion, the court of appeals clearly expressed its expectation that the Commission would resolve the problem by placing upon petitioners [Public Interest Intervenors] "only the burden of going forward with evidence in the first instance." By the strictures of the Communications Act of 1934, it is the licensee who is obligated to prove that renewal of his license is in the public interest, convenience, or necessity.³²

Burger concluded the opinion by chastising the FCC and by taking the unprecedented step of stripping WLBT of its

license:

...the practical effect of the Commission's action was to place on the Public Intervenors the entire burden of showing that the licensee was not qualified to be granted a renewal. The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors and their efforts.

The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.

The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest.

We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed³³ to invite applications to be filed for the license.

There is no question that the Church of Christ decision sensitized broadcasters to citizen groups. The license to broadcast is a valuable asset, and most broadcasters will carefully protect it. In many cases this encouraged the broadcaster to form a dialogue with the groups most likely to cause him damage.

Fred Friendly summarizes the importance of Church of Christ:

This decision of the court on "standing" was of significance far beyond Jackson. It opened the door to a new era in which blacks, Chicanos, women's groups and all organizations interested in improving television had standing to petition the Commission, and if dissatisfied with its ruling, to seek review in the courts. This meant that the public could no longer be ignored, either by the broadcaster or the FCC--that if one member of the public raised a substantial issue, the FCC must hold a hearing and resolve it in fair and reasoned fashion. For the first time the public could make the broadcaster account directly for his stewardship of the airwaves; no longer did it have to rely solely on the Commission or on sporadic congressional attention. Never before had so few--the five-man FCC majority--unintentionally done so much for the public interest than when they set the stage for Burger's historic opinion. Without this decision, public-interest law in the broadcast field would never have emerged.³⁴

Most broadcasters entered discussions with citizen groups as a means of avoiding litigation, while some were motivated by a genuine desire to serve the public interest. Whatever the reason, the discussions were new to both groups, and were only made possible by Church of Christ.

Chapter 3 Notes

¹According to the "marketplace of ideas" metaphor, the democratic process is best served when the media are owned by diverse interests. If one party gains control over several media in a given area, it can inhibit debate on public issues by emphasizing or ignoring public issues according to its own vested interests.

²Ralph Lewis Smith, A Study of the Professional Criticism of Broadcasting in the United States, 1920-1955, (Doctoral Thesis, University of Wisconsin, 1959) (New York: Arno Press, 1979), p. 29.

³"Cleaning Up Radio," Business Week, 18 May 1935, p. 25, cited in Donald L. Guimary, Citizens' Groups and Broadcasting, (New York: Praeger Publishers, 1975), p. 26.

⁴Guimary, Citizens' Groups and Broadcasting, p. 25.

⁵Ibid.

⁶Ibid., p. 32.

⁷Ibid.

⁸"Where May We Ask Was the FCC," Consumer Reports 25:1 (January 1960): 9-11, cited in Guimary, Citizens' Groups and Broadcasting, p. 35.

⁹Ibid.

¹⁰Guimary, Citizens' Groups and Broadcasting, p. 35.

¹¹Ibid.

¹²Fred W. Friendly, The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting, (New York: Random House, 1976), pp. 89-91.

¹³Ibid., p. 92.

¹⁴Ibid., p. 93.

¹⁵Office of Communication, United Church of Christ v. FCC, U.S. Court of Appeals for the District of Columbia, 359 F.2d 994 (1966), cited in Media Law Reporter, vol. 1, p. 1995.

¹⁶Ibid.

¹⁷Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 97.

¹⁸Office of Communication, United Church of Christ v. FCC, cited in Media Law Reporter, p. 1993.

¹⁹Ibid., p. 1996.

²⁰Ibid.

²¹Ibid., p. 1997.

²²Ibid., p. 2000.

²³Ibid., pp. 2000-2001.

²⁴Ibid., p. 2001.

²⁵Ibid.

²⁶Ibid.

²⁷Ibid., p. 2002.

²⁸Ibid., p. 2003.

²⁹Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 99.

³⁰Frank Kahn, Documents of American Broadcasting, 2d ed., (New York: Appleton-Century-Crofts, 1973), p. 659.

³¹Ibid., p. 662.

³²Ibid., pp. 663-664.

³³Ibid.

³⁴Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 98.

IV. CITIZEN INTERVENTION IN LICENSING

In the wake of Church of Christ many active citizen groups were formed, and during the period 1971-1973 an astounding 342 petitions to deny were filed.¹

The petition to deny is a mechanism by which an aggrieved party can formally ask the FCC to not renew a broadcast license. The most common complaints pressed by citizen groups were that minorities and women were underrepresented on the station's workforce, minority views were not presented in the stations programming, local programming did not address important community problems, and that the station did not adequately ascertain community needs.

The FCC originally denied standing to the citizen intervenors in Church of Christ partially because it feared its dockets would be clogged by all the new parties in interest. Yet, while there was some increase in litigation, it was relatively small. The main reason for this large increase in citizen participation yet small increase in litigation is the citizen-licensee agreement. Neither the broadcasters nor the citizen groups welcomed the expense and time involved in going to court. Willard Rowland summarizes this phenomenon:

Because of the growing costs faced by broadcasters, represented in legal fees and lost staff time, and

because of the threat of delayed renewal, permanent losses of licenses and potentially precedent-setting court actions, many station owners began to seek accommodations with the public groups. As a result many of these cases were finally settled out of court in the form of negotiated agreements between licensees and the challenging parties.²

The negotiated agreement was enthusiastically welcomed by the FCC when it first emerged, but instances of abuse by citizen groups brought about major policy statements regarding agreements between broadcast licensees and the public (December 1975) and reimbursement to the intervening parties (January 1976) that served to shut the doors to certain aspects of the agreements. But in the period spanning the first agreement between the licensee of KTAL-TV in Texarkana, Texas, and a local citizen group, and the issuance of the policy statements, some surprising concessions were won by the activists.

The KTAL Settlement

The ink was hardly dry on Burger's second Church of Christ opinion in the summer of 1969 when Reverend Parker and his Office of Communication went to the hinterlands to test the newly-won right to participate in legal proceedings before the FCC.

Parker went to Texarkana, where KTAL-TV had filed an application for renewal of its license in August, 1968. There

he helped a citizen group file a petition to deny on grounds of racial discrimination against blacks in its programming and employment practices. Blacks comprised 26 percent of the community. After a series of negotiations the citizen group and station management emerged with an agreement, which included the following provisions, among others:

(1) employment of minority staff members and public affairs director; (2) programs devoted to discussion of local controversial issues with both black and white participants; (3) programs directed toward informing poor persons of rights and services; (4) religious programs with all religions, denominations and local minority churches represented; and (5) periodic consultation with local citizen groups on local program needs.³

In turn for the concessions the group filed the agreement with the FCC on June 8, 1969, and withdrew the earlier petition. The license was renewed on July 29, 1969, partially based on the good faith agreement between the two parties. The FCC praised them for working out their differences:

We believe that this Commission should encourage licensees to meet with community oriented groups to settle complaints of local broadcast service. Such cooperation at the community level should prove to be more effective in improving local service than would be the imposition of strict guidelines by this Commission.⁴

The Church of Christ also persuaded KTAL to reimburse its expenses of \$15,137.11 that it incurred in facilitating the settlement. The Commission rejected the payment by a 4-3

vote, in spite of the fact that the arrangement stated that payment would not be considered a condition precedent to the rest of the agreement. The majority feared that "overpayments" might influence some settlements and that opportunists might file spurious petitions as a form of economic blackmail. The Commission decided to levy a flat ban on payments to petitioners.

In dissent, Commissioners Dean Burch and Nicholas Johnson argued that under the proper conditions reimbursement could enhance the public interest. They suggested four conditions for such arrangements:

1. That the petition to deny was filed in good faith by a responsible organization;
2. That the petition raised substantial issues;
3. That the settlement also entailed solid, substantial results; and
4. That there was a detailed showing that the₅ expenses claimed were legitimately and prudently made.

Parker appealed, and the Court of Appeals for the District of Columbia again sided with him. In this decision (hereafter Church of Christ III) the Court approved the concept of reimbursement because, "public participation in decisions that involve the public interest is not only valuable but indispensable," and that such payments could further public participation.⁶

The Court did not comment specifically on the KTAL agreement, but upon remand the Commission found the expenses

legitimate and allowed the payment. The Commission took the occasion to issue a Notice of Inquiry and Proposed Rulemaking to gather comments on the issue in order to develop procedures. The Notice was issued on June 7, 1972, and was not formally resolved until January 9, 1976. By the time the issue was resolved the negotiated agreement had lost a great deal of favor with the Commission.

The Capital Cities Settlement

Church of Christ I not only gave citizens the right of standing in license renewal cases, but also in license transfer cases. This was useful as a bargaining tool for some groups because license transfers are typically multi-million dollar transactions, and buyer and seller are often willing to make concessions in their haste to close the deal.

This was the case in the Capital Cities sale, which involved the transfer of broadcast stations from Triangle Publications, Inc., to Capital Cities Broadcasting Corporation. The transaction included AM-FM-TV stations in Philadelphia, New Haven, Connecticut, and Fresno, California, as well as TV stations in Albany, New York, and Huntington, West Virginia.

Citizen Communications Center (CCC), a foundation-supported public interest law firm run by consumer advocate Albert Kramer, filed a Petition to Intervene and Deny,

claiming that if the transaction were allowed, Capital Cities would immediately "spin off" some of the stations to third party buyers for its immediate financial gain. Kramer contended such "spin offs" would be a violation of Commission policy. Kramer also claimed the transfer was a violation of the Commission's Top-50 policy, which said that a transaction involving an increase in the concentration of ownership of certain major market TV stations could not be approved unless a "compelling public interest showing" could be made in support of the transfer.⁷

The Top-50 policy put a burden on Capital Cities to prove how the transfer would serve the public interest. This made Capital Cities amenable to talking with citizen groups in Philadelphia, New Haven and Fresno. Capital Cities needed something to meet the "compelling public interest" standard, and the citizen groups wanted greater responsiveness to community and minority needs.

The groups got together and, after a month of negotiations, struck a deal that served the needs of both. Capital Cities agreed to develop a three-year, million-dollar Minority Program Project which would develop programming relevant to the needs of blacks and hispanics in each market. In turn, CCC withdrew its petition to deny, and the terms of the agreement were presented as an amendment to Capital Cities' original applications. CCC then supported the applications before the Commission. The petition to deny was

withdrawn in January, 1971, and the transfer was approved February 26, 1971.

According to the terms of the deal, Capital Cities promised to generate at least six hours of programming annually at each station, with half being shown in prime time. Capital Cities remained in control of production, but consulted with minority advisory committees for ideas. If Capital Cities rejected any ideas from the committee, it was to offer a written statement explaining its reasons. The programming was funded by annual payments of \$333,333 by Capital Cities to accounts controlled by minority groups, with Philadelphia receiving \$135,000, New Haven, \$110,000, and Fresno, \$88,333.

The reimbursement issue came up in this case, with CCC asking for \$5,000 to covers its expenses. At the time, the KTAL decision banning reimbursement had been made, but the appeal allowing it (Church of Christ III) had yet to be handed down. Nonetheless, in somewhat vague language, the Commission claimed the payment was "of minimal significance" and allowed it.⁸

The agreement enabled Capital Cities to meet the "compelling public interest showing" in spite of its apparent violation of the Top-50 rule, so the transfer was allowed. Commissioner Nicholas Johnson said the agreement was the only reason he supported the transaction. He wrote:

The Capital Cities agreement clearly amounts to an important breakthrough for public participation in the process of administration and governance of the public airwaves. It may well be that FCC licensees have the responsibility under law to provide such programming--and more--already. But the fact remains that they don't do it, and the FCC doesn't insist upon it. At a time of mounting public outrage against the excesses and abuses of the corporate dominance of American broadcasting, it is at least heartening to see that humble citizens can extract some public service commitment from big broadcasters.

FCC Disapproval of Settlements

The KTAL and Capital Cities settlements provided models for citizen groups across the nation. But while these groundbreaking settlements were worked out by experienced communications lawyers, many others were negotiated by inexperienced ad-hoc groups. Many of these arrangements contained terms contrary to the spirit or the letter of the Communications Act. Also, because of either militance or greed, groups sometimes made excessive demands which would not be tolerated by the Commission.

The WAVO Agreement

The first such instance occurred in December 1971, when the Commission reviewed an agreement between the licensee of WAVO-AM-FM of Decatur, Georgia, and the Community Coalition of Broadcasting (CCB) of Atlanta.¹⁰ When Bob Jones University

attempted to transfer ownership of WAVO to Robert W. Sudbrink, the CCB filed a petition to deny. The two parties negotiated a series of minority hiring and programming concessions; subsequently, CCB withdrew its petition and the terms of the agreement were filed with the Commission.

While the agreement was in most senses typical of the settlements of the time, the Commission objected to its wording, which apparently gave CCB some responsibilities that belong only to the licensee. For example, the agreement stated that WAVO would "make maximum use of all available network programming of special interest to the Black community," and that such programming would not be "pre-empted without advance consultation with representatives of the CCB."

The Commission found this in conflict with the 1960 Programming Policy Statement:

The Commission. . .[has] consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee and that the fulfillment of such responsibility requires the free exercise of his independent judgement.¹¹

The WROR Agreement

In August 1973, the Commission found a second occasion to disallow an agreement. In this instance the Boston Community Media Committee (BCMC) had negotiated a series of typical

minority employment and programming concessions with WROR-AM.¹² One of the Commission's objections stemmed from the wording of the agreement, which was considered a relinquishment of license responsibility. Commissioner Richard Wiley said:

. . .I am disturbed by the willingness of some licensees, in an apparent attempt to avoid the Commission's processes, to abrogate their obligations as public trustees and turn over to third parties responsibilities which are uniquely their own. In my opinion, the public is ill served if those who are licensed to serve their communities and held accountable for their stewardship relinquish, for purely private reasons, the obligation to make independent judgements that affect the public interest.¹³

The Commission's second objection stemmed from the part of the agreement which obligated WROR to pay BCMC an annual "subscription fee" of either \$1,000 or 1.0 percent of the station's profits, whichever is greater. While the Commission recognized the right of the licensee to reimburse anyone for services rendered, in this case the payment "in no way appears to relate to services rendered nor does it bind BCMC to do anything. Consequently, our approval of such a provision would be clearly contrary to the public interest."¹⁴

The Proposed Agreements Rulemaking

The wave of petitions to deny and the willingness of

licensees to give away nondelegatable responsibilities were but two of the symptoms of a lack of clear Commission policy on broadcaster-citizen group agreements. Chairman Wiley summarized this as a "national tragedy," and called for a situation, "in which the criteria on which renewal will be judged by the FCC can be made known in order, ultimately, that the resources now expended in litigation can be employed more directly, more expeditiously and. . .more constructively in developing a better and more responsive broadcast service."¹⁵

In the Fall of 1974 Commission staff began work on developing a policy statement: that, according to Wiley, would "delineate the kinds of provision which. . .would be contrary to a licensee's public trusteeship and which we would be constrained to reject."¹⁶

This document was approved by unanimous vote of the Commission on June 10, 1975. Entitled Proposed Statement and Notice of Proposed Rulemaking in the Matter of Agreements Between Broadcast Licensees and the Public (hereafter Proposed Agreements Rulemaking), it addressed proposed Commission policy in four areas: (1) standards for broadcaster responsibility, delegation and accountability, (2) Commission procedures in enforcing citizen agreements, (3) Commission procedures in deciding whether or not to review agreements; and (4) conditions for citizen group reimbursement.¹⁷

The basic theme of the Proposed Agreements Rulemaking is that the broadcaster must have ultimate responsibility for

programming and management. It states that broadcasters have no obligation to enter into agreements, but may do so if they feel it will serve the public interest. The licensee may modify any agreement if he feels such changes will serve the public interest.

Another key point of the Proposed Agreements Rulemaking provides that agreements filed as part of a renewal application will be treated as representations to the Commission and are subject to its promise versus performance standards. However, there is an escape clause: if an agreement causes the licensee to surrender discretion, it has no force or effect. Another clause states that citizen groups do not give up the right to petition, even after forming an agreement with a licensee.

Other aspects of the Proposed Agreements Rulemaking state that the Commission will honor only written agreements, that it will not act as a local mediator or issue a definitive list of allowable agreements, and that agreements must be part of an application or accompany a complaint. It also says that "good faith" on both sides is a prerequisite in reimbursement agreements, and that the Commission will investigate any reported abuses.

Commissioners Benjamin Hooks and James Quello both issued concurring opinions to the Proposed Agreements Rulemaking that underscore its greatest problem: its vagueness. Hooks said he wanted, "the rules and policies finally adopted to give the

highest legitimate stature and widest breadth possible to such agreements," and that he would lift certain restrictions because they "appear to be unduly protective" of the broadcasters.¹⁸ Quello stated that the groups that negotiate agreements are not accountable to anyone, and that the Commission should simply not "concern itself with the existence or non-existence of any private agreement so long as the licensee meets his overall public responsibility."¹⁹ These widely diverging views of the same document suggest Chairman Wiley had failed in achieving his goal of a clear policy statement of citizen-licensee agreements.

The FCC received comments on the Proposed Agreements Rulemaking for several months after its issuance. While most comments recognized the value of some form of agreement, they broke down into the expected lines of broadcasters favoring increased control and citizens favoring increased participation.

Savings Clauses

While the Proposed Agreements Rulemaking was circulating for comment, the Commission had several opportunities to apply it to pending cases. In each, the main issue was improper delegation of responsibility by the licensee.

The citizen groups attempted to make their agreements conform with proposed Commission policy by adding clauses

which tempered specific demands with a statement that any part of the agreement which runs counter to law or policy would be of no effect. In some instances, these "savings clauses" were acceptable to the Commission; in others, their wording was not deemed strong enough.

The WAUD Savings Clause

In an agreement between the Human Relations Council of Alabama and WAUD, Auburn, the station agreed to produce locally 35 percent of all nonmusical programming and to have blacks deal with news of interest to blacks.²⁰ Further, it agreed to program two-fifths of all news with local and state news, and that "whenever a full-time vacancy occurs, a Black person will fill that position." Of concern to the Commission more than the terms of the agreement was their binding effect, which was seen as a relinquishment of responsibility by the licensee. The agreement was rejected by a 5-2 vote in spite of a savings clause which said the licensee "retains full responsibility for broadcast over its airways and. . .nothing herein abrogates that responsibility." In dissent, Commissioner Glen O. Robinson argued that the Proposed Agreements Rulemaking clearly states that (1) all agreements that surrender broadcaster control are of no effect, and (2) that the Commission is not to act as local mediator.

The KMJ Savings Clause

Interestingly, on the same day the Commission rejected the WAUD agreement, it approved a similar one between KMJ-TV in Fresno and the Television Advisory Committee of Mexican Americans (TACOMA). This agreement called for increased minority programming, a weekly program provided by TACOMA and prepared with the assistance of KMJ, a modified affirmative action plan, periodic meetings between TACOMA and KMJ management and improved ascertainment procedures.

Like the WAUD agreement, a savings clause was included. This one, however, was worded more strongly and was more complete. It read:

TACOMA understands that communication law and the rules of the Federal Communications Commission require that the final responsibility for all program decisions must remain with station management and nothing contained in the agreement shall be construed to be inconsistent with that requirement.²¹

The agreement was approved unanimously, although Commissioner Quello issued a concurring statement showing concern "that a single, highly vocal group, with an indeterminate constituency, can exert a disproportionate influence on programming for the entire community."²²

The KTTV Savings Clause

While the FCC accepted the TACOMA savings clause, it rejected a similar savings clause in another agreement. KTTV-TV, Los Angeles, negotiated an agreement with a coalition of citizen groups including the National Association for Better Broadcasting. The groups were concerned over the effects of violence on younger viewers, and included in the agreement a list of 42 cartoons which KTTV agreed not to broadcast, and a list of 81 other programs which KTTV agreed to precede with a warning to parents each time they aired.²³

The agreement also contained some typical minority programming concessions and a savings clause which read:

It is understood that nothing contained in this Agreement shall be deemed to foreclose KTTV from changing its program schedule, times of broadcast or varying the format of any of its programming, subject, of course, to Metromedia's compliance with its obligations referred to in the preceding paragraphs. It is further understood that Metromedia, consistent with its responsibilities to the total area served by Station KTTV, continues to remain solely responsible for determining what is to be broadcast over its facilities, subject as aforesaid.²⁴

The Commission found excessive delegation in the agreement and found the savings clause unacceptable. The agreement was rejected by a 5-2 vote. Another aspect of the agreement rejected by the Commission was the specter of censorship. It saw "inherent dangers" in permitting

"licensing procedures to become a vehicle for placing the Commission in the role of censor."²⁵

The Agreements Report and Order

These three cases provide little clarification of the Proposed Agreements Rulemaking. A savings clause appears to be the sine qua non for citizen-licensee agreements, but the required content of the clause is uncertain. Lying somewhere between the acceptable KMJ clause and the unacceptable WAUD and KTTV clauses is the line of demarcation.

After receiving and noting comments on the Proposed Agreements Rulemaking, the Commission approved it essentially intact as the Policy Statement on Agreements Between Broadcast Licensees and the Public (hereafter Agreements Report and Order) on December 10, 1975.²⁶ The Notice of Inquiry and Proposed Rulemaking on Reimbursements, initiated after the KTAL settlement, was closed on January 9, 1976.²⁷ Rather than set forth specific guidelines on reimbursements, as originally intended, the Commission simply deferred to the Agreements Report and Order, with its requirement of "good faith" between broadcaster and citizen group. Thus, after approval of the concept by the Court of Appeals, and after four years of delay, clear guidelines for reimbursements still did not exist.

Impact of the Settlements

While accounts of citizen-licensee settlements occupied a great deal of space in the trade press and in broadcasters' minds during the peak of their use, it is difficult to measure their effectiveness.

From the point of view of successfully presenting a petition to deny that resulted in actual loss of license, citizen groups were a dismal failure. According to an analysis by Grundfest, in the years 1971-1973, renewal applicants faced the following odds: of being subject to a petition to deny, one in 25; of having the application designated for a hearing for any reason, one in 200; and of having renewal of license denied, one in 600.²⁸ In analyzing 116 petitions which were resolved between 1970-1974, Grundfest found 67 unsuccessful (57.76%), 48 were withdrawn (41.38%) and one got a hearing (.86%). According to Grundfest, "the chances of facing a petition to deny seem to be very small, and the chances of being designated for a hearing or of having a renewal denied verge on the infinitesimal."²⁹

But it must be remembered that in most cases, increased sensitivity to and coverage of certain community issues, not denial of the license, was the goal of the citizen group. Filing a petition to deny is simply the largest lever the citizen group can use to influence the broadcaster's behavior. From this point of view the petitions, and the agreements that

sometimes ensued from them, can be judged a qualified success.

The citizen groups used such factors as the cost of litigations (both in terms of lost staff time and legal fees), delay in the licensing process, and uncertainty of its outcome in attempting to influence the performance of a broadcast station. It is difficult to quantify the value of the leverage of using these tactics, but the large number of petitions to deny and subsequent agreements suggest it is worth a great deal to the licensee to face an uncontested renewal.

A study by David Honig found that a petition to deny can be effective in influencing minority employment at broadcast stations.³⁰ He examined the impact of 10 variables on five factors measuring the rate of change in minority employment at 153 stations and concluded "the independent variable with the greatest significance in explaining changes in minority employment is that identifying whether the station had been the subject of a petition to deny or was located in a city where such petitions had been filed against other stations."³¹

Whether viewed as an honest attempt to enhance the public interest operation of a broadcast station or as a form of economic blackmail promulgated upon broadcasters by special interest groups accountable to no one, the citizen-licensee agreement has emerged as a new means of entry to the institution of broadcasting. Because of the vagueness of the Agreements Report and Order, and because of the savings clause

which effectively takes the teeth out of every agreement, the role of the agreement is still not clearly defined. Until a concise policy statement addresses the issue, the citizen-licensee agreement can be seen only as a safety valve for the minority community. But because of the escape clause contained in the Agreements Report and Order, the broadcaster can still renege on any aspect of any agreement, hiding behind the escape clause contained in the Agreements Report and Order.

Chapter 4 Notes

¹Joseph A. Grundfest, Citizen Participation in Broadcast Licensing Before the FCC, (Santa Monica: The Rand Corporation, 1976), p. 62.

²Willard D. Rowland, Jr., "The Illusion of Fulfillment: The Broadcast Reform Movement," Journalism Monographs, No. 79 (December 1982), p. 14.

³Ronald Garay, "Access: Evolution of the Citizen Agreement," Journal of Broadcasting, (Winter 1978), p. 98.

⁴Ibid.

⁵Grundfest, Citizen Participation in Broadcast Licensing Before the FCC, p. 41.

⁶Ibid., p. 42.

⁷Ibid., p. 44.

⁸Ibid., p. 46.

⁹Ibid., p. 47.

¹⁰Garay, "Access: Evolution of the Citizen Agreement," p. 100.

¹¹Ibid.

¹²Grundfest, Citizen Participation in Broadcast Licensing Before the FCC, p. 49.

¹³Garay, "Access: Evolution of the Citizen Agreement," pp. 100-101.

¹⁴Ibid., p. 49.

¹⁵"Wiley voices concern over 'national tragedy' exemplified by wave of petitions to deny," Broadcasting, Oct. 21, 1974, p. 8.

¹⁶"How far can citizen-group agreements go?" Broadcasting, December 23, 1974, p. 17.

¹⁷Grundfest, Citizen Participation in Broadcast Licensing Before the FCC, pp. 74-77 (Appendix A).

¹⁸Ibid., p. 78.

¹⁹Ibid., pp. 78-79.

²⁰Ibid., p. 115.

²¹Garay, "Access: Evolution of the Citizen Agreement,"
p. 102.

²²Grundfest, Citizen Participation in Broadcast Licensing
Before the FCC, pp. 119-120.

²³Ibid., p. 121.

²⁴Ibid., p. 122.

²⁵Ibid., p. 123.

²⁶Garay, "Access: Evolution of the Citizen Agreement,"
p. 103.

²⁷Grundfest, Citizen Participation in Broadcast Licensing
Before the FCC, p. viii.

²⁸Ibid., pp. 61-64.

²⁹Ibid., p. 61.

³⁰"Study finds clout in mere filing of petition to deny,"
Broadcasting, February 3, 1975, p. 34.

³¹Ibid.

V. THE ACCESS "DOCTRINE"

While the citizen groups were busy trying to influence broadcasters by intervening in the licensing process, a related movement was underway with the goal of gaining access to individual programs by using the Fairness Doctrine as a point of entry. While the citizen groups were primarily concerned with individual stations, those forging a new access "doctrine" were more concerned with the networks and their ability to set the national agenda for discussion of controversial ideas. Common to both of these kinds of intervention was the feeling that broadcasters had betrayed the public interest by avoiding--or by covering only one side of--such issues as the Vietnam War and environmental pollution.

The Fairness Doctrine

The Fairness Doctrine became FCC policy in 1949, and was written into the Communications Act in 1959. The goal of the Doctrine is "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." It has two tenets: one, that broadcasters "seek out" such conflicting views, and two, that they cover them fairly, on an overall basis. Part of the Fairness Doctrine is

the Personal Attack rule, which states that an individual attacked on the air must be notified, given a copy of the attack, and afforded a reasonable opportunity to respond.

Related to, but not part of, the Fairness Doctrine is the Equal Time rule, which requires licensees to afford candidates for public office "equal opportunities" to purchase air time.¹

The Personal Attack rule and the Equal Time rule provide a limited right of access to broadcasting. The choice of spokesman and of message is not under control of the broadcaster, yet he is obliged to carry such messages under the proper circumstances.

The Fairness Doctrine itself provides no such right of access. Jerome Barron writes, "If a broadcaster permits Position X to be broadcast, the Fairness Doctrine, on an overall basis, requires the broadcaster to provide reasonable opportunity for the discussion of Position Anti-X."² Thus, under the Fairness Doctrine, the broadcaster can select any issue and can choose the spokesmen for both sides. His sole obligation is to be fair.

In spite of these limitations, the Fairness Doctrine became the place of entry for an access "doctrine." As the cries for access became louder during the 1960s and 1970s, the FCC and the courts expanded the Fairness Doctrine and tacitly created a right of access to broadcasting. The first authoritative statement on such a right came from the U.S. Supreme Court in the 1969 landmark case Red Lion v. FCC.

Red Lion

The Red Lion case arose from a personal attack on journalist Fred Cook by the Reverend Billy James Hargis on radio station WGCB, Red Lion, Pennsylvania. Hargis, a right-wing fundamentalist, smeared Cook because he had attacked the Republican Presidential candidate in a book entitled Barry Goldwater--Extremist on the Right. When Cook asked the station for a free opportunity to respond, he was refused. The FCC then issued an order requiring WGCB to offer Cook reply time, and the station appealed to the U.S. Court of Appeals in Washington, D.C. Thus began the first case to test the constitutionality of the Fairness Doctrine.

The U.S. Court of Appeals found in favor of Cook and the Fairness Doctrine. However, the Radio-Television News Directors Association (RTNDA) realized there was more at stake than a few minutes of air time at a small station, so it made an appeal to the U.S. Court of Appeals in Chicago, which was reputedly more conservative than the Washington court. The Chicago court found the Personal Attack rules inhibited freedom of the press.

The two cases were joined for hearing before the Supreme Court, and a decision was handed down June 9, 1969. The Court unanimously voted that Cook was entitled to a free reply on WGCB, and that the personal attack and political

editorializing regulations were consistent with the First Amendment.

Justice Byron White, who wrote for the Court, found three reasons for upholding the Fairness Doctrine:

In view of the scarcity of broadcast frequencies, the Government's role in allocating these frequencies, and the legitimate claims of those unable without governmental assistance to gain access to these frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

Scarcity and governmental management of the airwaves have long been held as reasons justifying regulation of broadcasting. However, the third point, "the legitimate claims of those unable without governmental assistance to gain access," is a radical departure from the norm and seemed to provide new impetus to greater public participation in broadcasting.

Elsewhere in the opinion, White wrote:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninterrupted market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.⁴

These statements in Red Lion indicate that there is First

Amendment justification for increased public access to broadcasting. With this decision in hand, a number of groups stepped forward with test cases to create such a right of access.

Banzhaf

In December 1966, lawyer John F. Banzhaf III wrote a letter to WCBS-TV, New York, claiming that cigarette commercials run on the station presented one side of a controversial issue of public importance and, that under the Fairness Doctrine, the station was obligated to make its facilities available for the presentation of opposing viewpoints.

General Manager Clark George responded that WCBS had recently broadcast public service programs on smoking as well as five public service announcements from the American Cancer Society. Besides, George wrote, the Fairness Doctrine does not apply to commercials that promote the sale of goods and services.

Banzhaf then forwarded his complaint and the reply to the FCC and, to the surprise of both the broadcasting and tobacco industries, the Commission agreed with him. It said:

Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote

the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance--that, however enjoyable, such smoking may be a hazard to the smoker's health.⁵

Perhaps aware of the possible consequences of the holding, the FCC stated that it was to apply to only cigarettes. The Commission also rejected the request of "rough approximation of time" in favor of the "good faith, reasonable judgement of the licensee."⁶

The National Association of Broadcasters (NAB) and several tobacco companies appealed the decision to the U.S. Court of Appeals in Richmond, Virginia. They hoped they would get a sympathetic ruling in the heart of tobacco country. Banzhaf also appealed, even though the FCC had already basically agreed with him. His appeal was based upon wanting equal time for response, which was not granted in the FCC decision. In reality, however, the appeal was a ploy to get the case heard in the Washington, D.C., court, which was more liberal than the Richmond court. The scheme worked for the two cases were joined and heard by the D.C. court.

The Court of Appeals strongly supported the FCC's decision. Chief Judge David Bazelon wrote the opinion, which linked the public interest with the public health:

Whatever else it may mean, however, we think the public interest indisputably includes the public health. . . .

The power to protect the public health lies at the heart of the states' police power. . . .The public health has in effect become a new kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

Bazelon's opinion invoked the "marketplace of ideas" metaphor in upholding the Fairness Doctrine in this case. First, he pointed out that the ruling does not ban any speech, and that commercial messages barely qualify as protected "speech." Then he considered the goal of his decision:

. . .a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. . . where. . .one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself--we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.

Bazelon's approval of the broadcaster's duty to present both sides of the smoking issue is an affirmation of the fairness concept. But in upholding the FCC's requirement that broadcasters run countercommercials, he is embracing access. For the first time (not including the personal attack and

Equal Time rules) a specific right of access was created for a specific position--the anti-smoking position. The justification for this was the Fairness Doctrine.

While Bazelon generally upheld Banzhaf's contentions, he rejected the request for equal time as "an unnecessary intrusion upon the licensee's discretion."⁹

The NAB and tobacco interests in the case appealed to the Supreme Court, but it denied certiorari and let the lower ruling stand. Having exhausted possibilities in the judicial branch, the tobacco interests turned to Congress for help. On April 1, 1969, it passed legislation prohibiting cigarette ads on radio and television after January 1, 1971.¹⁰

Other Commercials Addressing Controversial Issues

In Banzhaf the issues were fairly clear. Numerous studies, including a 1964 report by the U.S. Surgeon General, had linked smoking with cancer and other serious diseases. The cigarette ads were clearly advancing one side of a controversial issue of public importance. Judge Bazelon's opinion that the smoking issue triggered the Fairness Doctrine was novel and challenged the structure of the broadcaster-advertiser relationship, but was an understandable application of the Fairness Doctrine.

While Bazelon limited his decision to the issue of smoking, it was only a matter of time before other products

became involved. Many products, such as high-phosphate detergents, insecticides, electricity generated by nuclear power and foods laced with chemical additives, are seen as controversial by some. The lure of free countercommercials proved stronger to some activists than Bazelon's statement that his decision should not be seen as a precedent for getting free time for rebuttals to other product announcements.

In Re Complaint by Alan F. Neckritz and Lawrence B. Ordower (hereafter Chevron) was one such case.¹¹ The petitioners invoked the Fairness Doctrine in challenging ads that claimed Chevron Formula F-310 gasoline reduced pollution. The Commission took no action on the complaint because it felt the ads did not involve a controversial issue of public importance and because the Federal Trade Commission was the appropriate agency to address claims of false and deceptive advertising. However, in a footnote, the Commission noted:

This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.¹²

This position was tested by two environmentalist

organizations with In Re Complaint by Wilderness Society and Friends of the Earth.¹³ In this case commercials advocating development of oil reserves in Alaska were held to invoke fairness obligations. The Commission ordered the stations involved to submit a statement within 10 days, detailing plans to present contrasting views.

Friends of the Earth

In August 1970 the Friends of the Earth (FOE) complained to WNBC-TV, New York, that ads for large automobiles advanced one side of a controversial issue of public importance. FOE contended that air pollution was a serious problem, and that the automobile ads did not address both sides of the pollution issue. They offered to produce broadcast spots presenting the anti-pollution arguments.

The station management refused the request, citing several programs on pollution it had produced and broadcast to ventilate both sides of the issue. The management further stated that Banzhaf was limited to the issue of smoking and did not apply to other product commercials.

FOE filed a complaint with the FCC, which deferred to Banzhaf's limitation to cigarettes. While it recognized the complexity of the issue, the FCC clearly did not want to open all product commercials to the specter of free rebuttals.

FOE then appealed to the District of Columbia Court of

Appeals, which held that use of automobiles--like the use of cigarettes--poses significant health hazards. According to Judge Carl McGowan, who wrote for the majority, "The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger."¹⁴

McGowan chided the Commission for taking Banzhaf too literally, then he cited two precedents for applying the Fairness Doctrine to commercial messages. In Chevron, the FCC found a commercial that debated a controversial issue to the community--rather than selling goods and services--was subject to fairness obligations.¹⁵ In another case, In re Wilderness Society and Friends of the Earth, the Commission found commercials advocating the Alaska pipeline subject to the Fairness Doctrine.¹⁶

Realizing the impact of his decision, McGowan remanded the case to the FCC, "to determine whether the licensee had been adequately discharging its public service obligations . . . to achieve the balance contemplated in the Fairness Doctrine."¹⁷

This potentially sweeping decision did not rock the broadcast industry as it could have done. Without Commission decision, FOE settled with WNBC so no major precedent was set. FOE agreed not to pursue further the case in turn for a total of 120 minutes of free time for its antipollution messages.

David C. Green

The FCC also won another case that addressed a similar issue. In addressing a complaint by David C. Green, a peace advocate who had asked two stations for a right to reply to military recruitment ads on two stations, the U.S. Court of Appeals supported the FCC's contentions that: (1) the ads raised no controversial issues; (2) the issues of the Vietnam War were well-presented in all media; and (3) no individual member of the public has a right of access to the media.¹⁸

These three cases--Banzhaf, Friends of the Earth, and Green--address the issue of applying the Fairness Doctrine to advertising, but they fail to resolve anything or even show a sense of direction. Banzhaf was made moot by the law that eliminated cigarette commercials from broadcasting, while Friends of the Earth and Green had conflicting resolutions.

Fairness Doctrine Ruling

The FCC did not address this lack of policy until July 12, 1974, when it published a ruling on the Fairness Doctrine. In this ruling the Commission stated that it did not believe "that the underlying purposes of the Fairness Doctrine would be well served by permitting the cigarette case to stand as a

Fairness Doctrine precedent."¹⁹ In the FCC's view, a commercial can "contribute nothing to public understanding" of such issues as air pollution. The Commission also found such rulings as Banzhaf and Friends of the Earth to threaten the structure of our broadcasting system, and that, "Accordingly, in the future, we will apply the Fairness Doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues."²⁰

Access to Program Time

While the FCC and the courts were struggling to establish the relationship between the Fairness Doctrine and advertising, a parallel movement was underway to clarify the Doctrine's role in news and public affairs programming. A prime factor in this controversy was the Nixon Administration's effective and extensive use of the media.

As the Vietnam War escalated and as public opinion turned against it, President Nixon increasingly turned to television to defend his actions. Most press conferences were automatically covered by all three commercial networks, and such "roadblocking" could bring Nixon to as many as 60 percent of all sets in use.²¹

Between November 1969 and August 1970, Nixon made five prime-time appearances on national television. Led by

Democrat George McGovern and Republican Mark Hatfield, a group of 14 "dove" senators filed a complaint with the FCC demanding an opportunity to respond to Nixon "whenever the issue is one in which the Senate has a role to perform in seeking resolution of the issue."²²

The FCC clarified these requests for access rights on August 14, 1970. While it rejected the senators' specific access request, it did find that "in the light of the fact of five Presidential speeches on this issue, we believe that more is required of each of the networks," and, that ". . .time be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss this issue with the length of the prior efforts in this area of uninterrupted presentations."²³

Thus, just as Banzhaf created a specific right of reply to antismoking commercials, the FCC created a specific right of reply to opponents of the Vietnam War.

Paid Access to Program Time

In addition to the peace senators who asked the FCC for a fairness review, the Democratic National Committee (DNC) felt there was some need to redress the balance of power. On May 19, 1970, the DNC asked the FCC to make the following declaratory ruling:

That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues.²⁴

FCC Ruling

The FCC ruled that broadcasters were not obligated to sell anyone program-length segments of time for the discussion of public issues, but it did state: "this would appear particularly to be an area where the relatively short announcement, limited very largely to fund solicitations, is both effective and appropriate."²⁵

In this decision the FCC recognized a right of access for issues--in that it is the right of the electorate to be informed--rather than an individual right of access. In the Commission's view, the Fairness Doctrine, with its requirement to "seek out" issues and to present them fairly, is the preferred mechanism for ensuring a well-informed public.

Commissioner Johnson's Dissent

Nicholas Johnson wrote a blistering dissent attacking the Commission's "fantastically skewed" values:

As the system now operates, any person wishing to sell products--toothpaste or "feminine deodorant spray," for example--has direct, personal and instant access to television. He can present his message in the form he

wishes--not in terms of "issues" (the general benefits of toothpaste and deodorant), but in terms of individual products. He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine--an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

. . . We have an individual right of access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him.²⁶

CBS v. Democratic National Committee

The Democrats appealed this decision to the U.S. Court of Appeals for the District of Columbia. Joining in the appeal was the Business Executives' Move for Vietnam Peace (BEM), which wanted to purchase spot announcements urging an immediate end to the Vietnam War, but which had been refused by WTOP, a Washington, D.C., radio station. DNC wanted a general endorsement of a right of paid access, while BEM had a specific access complaint.

The Court of Appeals Decision

Judge J. Skelly Wright wrote the opinion, which reversed the FCC and stated that "a flat ban on paid public issue announcements is in violation of the First Amendment."²⁷ Wright considered "state action" to apply to broadcasters since they have a relationship of interdependence with the

government via the licensing process. Because broadcasters accepted product commercials, Wright contended they could not discriminate against non-candidate oriented political ads (candidate ads are protected by Section 315 of the Communications Act). Wright did not require that all political ads be allowed on the air; he left it to the Commission to find an appropriate mechanism to carry out the mandate of his decision.

Wright distinguished between normal programming, which was subject to the Fairness Doctrine, and advertising time, for which he opened a new right of access:

In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcaster's own interests in free speech are very, very strong. The Commission's Fairness Doctrine properly leaves licensees broad leeway for professional judgement in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. Their speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.²⁸

Wright felt that advertising time could make an effective contribution to public debate:

For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism--sometimes said to be characteristic of radio and television as a whole--have found an especially effective outlet. We are convinced that the time has

come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has a great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.²⁹

The Supreme Court Decision

On appeal, the Supreme Court reversed Wright's decision in that court's first major statement on broadcasting since Red Lion. Unlike Red Lion, which was decided unanimously and required only one opinion, CBS v. DNC was decided by a 7-2 vote requiring five opinions, with four for the majority.

Chief Justice Warren Burger, who wrote the first majority opinion, emphasized the editorial autonomy required by the First Amendment. He believed that access requirements as envisioned by Judge Wright:

. . . would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain--no matter how difficult the task--essentially private broadcast journalism held only broadly accountable to public interest standards.³⁰

Although the CBS v. DNC decision concerned only advertising and not regular programming time, Burger chided Wright's decision because it would place the FCC in the position of reviewing "day-to-day editorial decisions."³¹ He made it clear that only general oversight, such as by enforcing the Fairness Doctrine, was permissible:

It seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.³²

The principal rift in the majority concerned the proper role of the Fairness Doctrine. Burger felt that its reliance on licensee discretion made access more difficult, but that its requirements to seek out and cover issues fairly were a necessary imposition on broadcasters. Justice William O. Douglas stated flatly: "The Fairness Doctrine has no place in our First Amendment regime."³³ Situated between these two extremes were Potter Stewart, who sided more with Douglas, and Byron White, who allied more with Burger.

The Dissent

In dissent, William J. Brennan, Jr., and Thurgood Marshall acknowledged the powerful role of broadcasting in the discussion of public issues and said, "Any policy that absolutely denies citizens access to the airwaves necessarily renders even the concept of 'full and free discussion' meaningless."³⁴ Justice Brennan added:

. . . freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum--whether it be a public park, a schoolroom, a town

meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed.³⁵

Brennan and Marshall thought that "the issue in this case is not whether there is an absolute right of access, but rather, whether there may be an absolute denial of such access."³⁶ They opposed the flat ban on paid issue announcements and the policy of "leaving broad latitude to the Commission and licensees to develop. . . reasonable regulations to govern the availability of advertising."³⁷

Ironically, by 1973, when this opinion was written, President Nixon was mired in the Watergate scandal and was no longer using television in the same way that garnered the complaints that launched this case. The Vietnam War, the subject of BEM's access request, was over for the United States. While the CBS v. DNC decision was seen as a loss for the citizen access movement, it also prevented the oil companies from mounting an extensive propaganda campaign during the 1973 Arab oil embargo.³⁸ Thus, like the Fairness Doctrine, the results of the CBS v. DNC decision both implemented and inhibited full and free discussion of issues of public importance.

The Access "Doctrine?"

Jerome Barron published his book Freedom of the Press For Whom? in 1973, after the U.S. Court of Appeals affirmed a right of paid access in CBS v. DNC. At the time, the idea of access to broadcasting was at its zenith. Barron observed:

The pattern for the future is already evident. The FCC is being instructed by the courts that certain segments of the broadcast day are open to public access as a matter of First Amendment compulsion. The licensee has the task of responding to the request for access.... The new challenge to both the FCC and the broadcasters is to discover a sensitivity to access problems that they have not displayed in the past.

But Barron had spoken too soon. Instead of increased access in the 1970s, the trend was reversed as government gradually returned autonomy to broadcasters. The period of experimentation with access rights can be roughly framed by two major Supreme Court decisions: 1969's Red Lion, which supported the rights of viewers and listeners, and the 1973 CBS v. DNC, which emphasized the importance of editorial autonomy. In fact, the trend reversed from increased access to increased deregulation.

The idea of a access "doctrine" is easily understood from the citizen groups' point of view. The FCC and the courts favored social justice and expanded access rights in a few anomalous cases such as Banzhaf and Friends of the Earth. But when citizen groups cited these cases as precedents for even

greater public access, the FCC and the courts were placed in the dilemma of either admitting their mistakes or radically changing the structure of the broadcast industry. It took a major statement, such as that of the Supreme Court in CBS v. DNC, to restore the balance initially upset by the access rhetoric found in Red Lion.

Chapter 5 Notes

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³Red Lion Broadcasting Company, Inc. v. FCC, 395 U.S. 367 (1969), pp. 2066-2067.

⁴Ibid., pp. 2062-2063.

⁵In re Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine, 8 FCC 2d (1967), pp. 381-382.

⁶Ibid., p. 383.

⁷John F. Banzhaf III v. FCC, 405 F.2d 1082, 1086 (1968), cited in Media Law Reporter, vol. 1, p. 2047.

⁸Ibid., p. 2052.

⁹Banzhaf v. FCC, p. 1103, cited in Fred W. Friendly, The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting, (New York: Random House, 1976), p. 107.

¹⁰Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 108.

¹¹29 FCC 2d. 807 (1971).

¹²Ibid., p. 812.

¹³30 FCC 2d. 643-646 (1971).

¹⁴Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 113.

¹⁵Ibid.

¹⁶Ibid., p. 114.

¹⁷Ibid.

¹⁸David Green v. FCC, 447 F. 2d. 323 (D.C. Cir. 1971), cited in Jerome A. Barron, Freedom of the Press For Whom? The Right of Access to Mass Media, (Bloomington: Indiana University Press, 1973), p. 183.

¹⁹Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 115.

²⁰In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 FCC 2d 1, 26 (1974), cited in Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 116.

²¹Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 123.

²²Barron, Freedom of the Press For Whom, p. 160.

²³Ibid., p. 163.

²⁴450 F. 2d 642 (D.C. Cir. 1971), cited in Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 125.

²⁵Request for a Declaratory Ruling Concerning Access to Time on Broadcast Stations From the Democratic National Committee to the FCC, 25 FCC 2d 230 (1970).

²⁶Ibid., p. 233.

²⁷Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 134.

²⁸Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access, (New York: Praeger Publishers, 1976), pp. 175-176.

²⁹Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 134.

³⁰412 U.S. 94, 93 S. Ct. 2080, cited in Schmidt, Freedom of the Press vs. Public Access, p. 177.

³¹Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 135.

³²Ibid., p. 136.

³³Ibid., p. 138.

³⁴Ibid., p. 140.

³⁵Schmidt, Freedom of the Press vs. Public Access, p. 180.

³⁶Friendly, The Good Guys, The Bad Guys and the First Amendment, p. 140.

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³⁹Barron, Freedom of the Press for Whom?, p. 187.

VI. SUMMARY

The decade 1966-1976 is remarkable for the changes that took place in the broadcaster-citizen relationship. The Church of Christ decisions gave citizen groups standing in licensing procedures for the first time. Diverse citizen groups initiated dialogues with broadcasters that resulted in greater minority participation in broadcasting and greater coverage of the minority community. The fairness concept was challenged and refined, and there was some experimentation with creating a limited right of access to the electronic media.

The Church of Christ decisions are important not only because they gave citizens the right for the first time to participate in license renewal cases before the FCC, but because they still stand. Unlike most other forays into expanded access rights by Congress, the courts and the FCC, Church of Christ has become an integral part of the licensing system. This must be seen as the major victory of the decade for the citizen activists. Church of Christ is unique among other attempted access provisions in that it proved practical from an administrative view. The expense of intervening has kept the right of standing from abuse by the citizen groups.

While Church of Christ I broke new ground by granting standing rights in licensing, Church of Christ II has had less

impact. The decision by a federal court to strip a broadcast station of its license was unprecedented, but Church of Christ II otherwise created no new rights. In retrospect, the decision served more to warn the broadcasting community that a new, active era in broadcast regulation was beginning.

This era was marked by a new kind of activism--the negotiated agreement between citizen groups and broadcasters. This created a kind of access for the citizen group in that it resulted in communication with the broadcaster. Admittedly much of this communication was hostile, but in some instances negotiated agreements enhanced the public service performance of stations while getting media coverage of under-represented ideas and minority groups.

The failure of the negotiated agreement was its abuse by the citizen groups. Excessive demands alienated not only the affected broadcasters, who came to view the agreements as quasi-legitimate extortion, but the FCC as well. Seeing many agreements as undermining license discretion, the Commission created stricter standards for the agreements which effectively reduced them to little more than guidelines.

Another failure of the negotiated agreements can be traced to the source of their power, the petition to deny by the citizen group. Denial of broadcast licenses was rarely the goal of the citizen groups, although it was the only legal recourse available. The only mechanism which might have remedied this was a limited right of access. Using such a

right, citizens could state their views on the air and in their own words.

The idea of a limited right of access became popular during the late 1960s and early 1970s as the FCC, Congress and the courts addressed the issue. The courts took the initiative, starting in Red Lion. In that case, the Supreme Court used access rhetoric to address a fairness complaint. The Court emphasized the rights of the viewer and listener over those of the broadcaster and stated that the need for access was a rationale for regulating broadcasting.

In Banzhaf the U.S. Court of Appeals for the District of Columbia created a right of reply to cigarette commercials. In the court's view, the public health was equated with the public interest. Using this argument, citizen activists attempted to get response time to other commercials which promoted potentially harmful products. Realizing the administrative nightmare this presented, the courts backed away from this approach in a series of cases.

The right of paid access was the last frontier in the movement to get access to broadcasting. The Democratic National Committee went to court over the right to purchase air time to counter President Nixon's heavy use of television. The U.S. Court of Appeals affirmed the DNC's request. The court considered broadcasting to be a kind of "state action" because of the licensing process and, as such, broadcasters were required to accept ads without discrimination--whether

they are for products or ideas. The court found no First Amendment conflicts in this because the broadcaster typically surrenders control of content to the advertiser.

The Supreme Court reversed this decision on appeal. It found such a requirement to be in conflict with the First Amendment rights of broadcasters, who are only broadly accountable to public service obligations.

This decision effectively quelled the movement to gain access to broadcasting. While the pro-access forces have won some minor skirmishes, the broadcasting industry has clearly won the war. The trend toward increasing access in the 1960s rapidly reversed in the 1970s, creating even stronger rights for broadcasters. Finding the access doors closed, the citizen groups have increasingly turned to other issues and tactics.

VII. AFTERWORD

While citizen groups largely failed in their effort to achieve and maintain greater access to broadcasting, they did affect broadcast policy in a number of ways. Perhaps most importantly, the citizen groups made their presence known to broadcasters, the FCC and Congress, constantly and subtly reminding them of their public service obligations.

Since the Supreme Court rendered its CBS v. DNC decision, however, the citizen group movement has declined. One reason is the trend of deregulation, which has erased many public service obligations and created an atmosphere of discouragement. The "deregulation" begun by the Wiley Commission and the "reregulation" of the Ferris Commission have given way to the no-holds barred "unregulation" of the Fowler Commission.

To reverse or even to slow this trend, citizen groups must begin concerted action on two levels. One, they must continue attempts to improve broadcasting as we now know it, and two, they must lobby to ensure some form of public service obligations in the new technologies.

The Citizen Groups Today

If citizen groups are to continue effective participation in the telecommunications policy-making process, they must

attract a broad-based constituency and the stable funding that goes with it. One study of national citizen groups found that most operate with annual budgets of \$20,000 or less.¹ The larger groups, such as Accuracy in Media, and Action for Children's Television, are better funded but are dependent upon unstable foundation money.

A 1976 report of the conference on the public interest media reform movement sponsored by the Aspen Institute concluded that citizen groups needed better allocation of tasks and coordination of activities. Specifically, the report cited the need for information collection and distribution, centralized legal back-up centers which would develop model petitions and other legal advice, improved lobbying resources and better research coordination.²

Citizen group leaders are no longer willing or able to count on the active support of the FCC, Congress or the courts in the current deregulatory environment. The prevailing attitude is that citizen groups must get bigger, more stable and more serious in their endeavors if they are to be taken seriously by the powers that be. The authors of a study commissioned by the National Citizens Committee for Broadcasting (NCCB), the Veatch Program, and the Rockefeller Family Fund suggested the following agenda for the citizen groups:

(a) credible research; (b) translation of the credible research for public consumption; (c) wide public dissemination of the research; (d) expressed concern by organized groups with established credentials and sizable

membership; (e) responsible media executives; and (f) wide distribution of production skills and resources through all segments of society.³

Another recommendation by the authors reflects the shift in the policy-making process toward increased reliance upon marketplace forces as a rationale for regulation:

We believe the major thrusts in broadcast reform will be in arenas outside the federal administrative agencies and the courts. These areas would appear to be shareholder pressure on corporate decision-making, mobilization of public opinion to influence Congress, the development of rating systems which measure targeted audience responses to particular program content, increased research on the effect of program content on particular audience segments, and the development of production skills which will translate into a more varied and balanced representation of American society on the television scene.⁴

Organized groups have had some success when applying economic pressure to influence broadcasting. In one instance, the American Medical Association provided funds to the NCCB to study the sponsorship of the most violent and least violent television shows. The NCCB gave this information to the national Parent-Teachers Association (PTA), which mobilized six and a half million members to protest the most offensive programs. Using the same information, the Inter-religious Committee for Corporate Responsibility (ICCR), a part of the National Council of Churches, mobilized church groups with financial interest in corporations which supported violent

programs to seek stockholder resolutions condemning further sponsorship. These groups succeeded in six of seven instances. The networks credited these actions as a major factor influencing the shift away from violent programming in the late 1970s.⁵

Looking to the Future

New technologies such as cable television, direct broadcast satellites, low-power television and videotext are changing and fragmenting the telecommunications marketplace. While each of these technologies may ultimately appear in the same place (on the home television screen), they are regulated in different ways.

This emerging mixed marketplace offers an extraordinary opportunity for concerned consumers to initiate policy rather than change it after it is made. As former Congressman and chairman of the House Telecommunications subcommittee Lionel Van Deerlin said:

If [the media reform movement] is to remain not only alive but effective, it must expand its vision. This means, quite simply, that the movement must acquire a working knowledge of new telecommunications technology and a broader political base. . . While the media reform movement concentrates its efforts on blocking radio deregulation and imposing new rules on children's television, it is missing an excellent opportunity to shape the new telecommunications industry instead of merely reforming the old; to create policy instead of merely responding to it.⁶

Media reformers must make the case to Congress and the FCC for the value of certain kinds of media service which are socially important but poorly served by the economic marketplace. Such services include educational, cultural, children's and "free speech" programming.

Educational broadcasting has provided an example of how these services can coexist with commercial programming. On three separate occasions the FCC has set aside channels for educational use when allocating spectrum space for new technologies: with FM, VHF and UHF television, and Instructional Television Fixed Service. These allocations have served as a tithe or an electronic land grant to ensure, in the words of one educational broadcaster, "that a certain level of capacity...be reserved in each service for the development of those activities that support public, as distinct from private, interests."⁷

Citizen groups can emulate this strategy by lobbying for a limited number of nonprofit, common carrier channels in such emerging technologies as low-power television and direct broadcast satellites. By creating room for educational and access channels, profit-oriented and service-oriented broadcasters can exist side-by-side. Creation of common carrier channels could, in fact, serve as a rationale for eliminating fairness requirements in commercial channels.

Rather than wait for a more sympathetic FCC and Congress, citizen groups must revitalize and begin a two-tiered program

of influence. They must form an effective lobby to influence broadcasting as it currently exists, and they must attempt to see public service obligations imposed on the emerging technologies that will dominate the telecommunications marketplace of the future.

Chapter 7 Notes

¹Anne W. Branscomb and Maria Savage, "The Broadcast Reform Movement: At the Crossroads," Journal of Communication 23, Autumn, 1978, p. 28.

²Frank Lloyd, "Public Interest Communication Law: Where Have We Been and Where Are We Going?" Report of the Conference sponsored by the Aspen Institute and the Council for Public Interest Law, June 1976.

³Branscomb and Savage, p. 33.

⁴Ibid., p. 34.

⁵Ibid., p. 30. This strategy was also used successfully by Rev. Donald Wildmon in a 1981 crusade against "moral indecency" in television. See Newsweek, June 29, 1981, p. 60, and Newsweek, July 13, 1981, p. 70.

⁶Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, The Politics of Broadcast Regulation 3d ed., Forward by Newton Minow, (New York: St. Martin's Press, Inc., 1982) p. 62.

⁷Joseph Welling, "Setting Communications Policy: Where Are the Colleges?" Chronicle of Higher Education, April 27, 1983, p. 56.

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CITIZEN ACCESS TO BROADCASTING
IN THE 1960s AND 1970s

by

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This thesis examines the citizen movement to gain access to broadcasting, from the landmark 1966 decision, United Church of Christ v. FCC, to the most recent Supreme Court decision on the subject, CBS v. Democratic National Committee (1973).

Church of Christ made the movement possible by allowing citizens legal standing before the Federal Communications Commission. Citizens exploited this new right by forming pressure groups which attempted to influence the programming and management of broadcast stations. Stations would often negotiate agreements with the groups rather than risk the time, money and possible loss of license involved in litigation. The FCC initially approved of the agreements, but instances of abuse by the citizen groups brought about policy statements greatly limiting their effect.

In a related movement, the courts and the FCC began to tacitly create an access "doctrine" based upon liberal interpretations of the Fairness Doctrine. This was stopped short by the U.S. Supreme Court's decision in CBS v. DNC, in which the Court denied a request for a right of paid access and came down squarely in favor of increased broadcaster discretion.

The study examines citizen groups from their admission as a determiner of regulatory policy via Church of Christ through the major access-related cases, ending with CBS v. DNC. Legal scholar Jerome Barron's concept of an access "doctrine" as an extension of the Fairness Doctrine is explored and developed.

The study traces the status of access provisions at any given time in the period, illustrating the opening and closing of the access "doors." An afterword examines the achievements and goals of the citizen access movement of the 1960s and 1970s in light of the deregulatory trend of the 1980s.